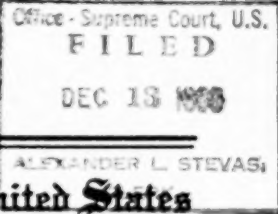


No. 83-372



In the Supreme Court of the United States

OCTOBER TERM, 1983

FRANCHISE TAX BOARD OF CALIFORNIA, APPELLANT

v.

UNITED STATES POSTAL SERVICE

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether a state agency may require the Postal Service to withhold sums from the wages of its employees to pay the employees' delinquent tax liabilities, when federal statutes providing for the enforcement of levies by state agencies permit the withholding only of anticipated tax liabilities.

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Pursuant to Rule 16.1 of the Rules of this Court, the Solicitor General, on behalf of the United States Postal Service, moves that the appeal be dismissed or, in the alternative, that the judgment of the court of appeals be affirmed.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 698 F.2d 1029.

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1983 (Pet. App. 1). A petition for rehearing was denied on June 3, 1983 (Pet. App. 26). A notice of appeal was filed on August 12, 1983 (Pet. App. 27). The Jurisdictional Statement was filed on August 31, 1983. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(2). We discuss this Court's jurisdiction at pages 7-8, *infra*.

STATEMENT

Appellant is an agency of the California state government. Under Cal. Rev. & Tax. Code § 18817 (West 1983), appellant may "require any employer * * * having in [its] possession, or under [its] control, any credits or other personal property or other things of value, belonging to a taxpayer * * * to withhold * * * the amount of any tax, interest, or penalties due from the taxpayer * * * and to transmit the amount withheld to" appellant. In 1978, appellant sought to collect delinquent personal income taxes from four Postal Service employees by serving "orders to withhold," pursuant to Section 18817, on the Postal Service. When the Postal Service declined to withhold the amounts sought by appellant from the employees' wages, appellant brought this action in the United States District Court for the Central District of California, seeking the amounts in issue. J.S. App. 7-8, 20-21.

The district court granted summary judgment in favor of the Postal Service.¹ It based its ruling primarily on 5 U.S.C. 5517. Section 5517 specifies that when a state statute provides for taxes to be collected by withholding from employees' pay, the federal government shall, upon request by the state, "enter into an agreement with the State * * * [which] agreement shall provide that the head of each agency * * * shall comply with the requirements of the State

¹This action was consolidated with a suit against the Postal Service brought by another California state agency, the Employment Development Department, which sought to recover unemployment insurance taxes allegedly owed by contractors that had done work for the Postal Service. The district court ruled in favor of the Postal Service (J.S. App. 23-24), but the court of appeals reversed (*id.* at 2-7), and we have not sought further review.

withholding statute in the case of employees of the agency who are subject to the [state] tax * * *." The district court noted that the agreement between California and the federal government provided only for the withholding of anticipated taxes and "does not require any collection of delinquent tax liabilities by federal officials in any manner whatsoever" (J.S. App. 23).

The court of appeals affirmed. It ruled that while Cal. Rev. & Tax. Code § 18817 can reach federal agencies, 5 U.S.C. 5517 "excused" the Postal Service from honoring appellant's orders to withhold because the agreement between California and the federal government "specifically states: '3. Nothing in this agreement shall be deemed: . . . (b) to require collection by agencies of the United States of delinquent tax liabilities of federal employees' " (J.S. App. 9-10). The court also noted that regulations implementing Section 5517 contain a similar limitation (J.S. App. 10, citing 31 C.F.R. 215.12(a)). The court accordingly held (J.S. App. 13):

In view of the agreements and regulations pursuant to the authorization of § 5517, federal cooperation with state withholding tax statutes is limited to current withholding from current wages to meet current anticipated tax liabilities of the federal employee. Withholding of wages of federal employees cannot be used to collect delinquent tax liabilities.

The court of appeals also rejected appellant's arguments that Section 5517 is no longer applicable to the Postal Service (J.S. App. 11-12), and that 39 U.S.C. 401(1), which provides that the Postal Service may "sue and be sued in its official name," authorized appellant's order to withhold (J.S. App. 13). Judge Schroeder dissented, reasoning that "[t]he federal courts have consistently held that [39 U.S.C.]

